IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

No. 11553

BYRON W. WOOD,
Appellant,
VERSUS
PAUL GREIMANN,
Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT

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STATEMENT OF CASE, PLEADINGS AND FACTS

The statements of the case, facts, pleadings and proof on the part of the appellee, comprising Pages 1-5, inclusive of the Brief of Appellee, and the statements of the case, pleadings, facts, and proceedings had and orders and decrees made and entered herein comprising Pages 1-19, inclusive of the Brief on behalf of Appellant, present no issue and are substantially the same except the statements in Appellant's Brief are full and comprehensive.

No issue of fact and only one question of law involved on this appeal.

Under the heading "ARGUMENT," beginning on Page 6 and extending to and including Page 10 of Appellee's Brief, it is asserted that on Pages 19, 20, 21, 22, 23 and 63 of Appellant's Brief appear repeated statements that the letter presented for probate as the will of J. M. Pearl, deceased, states said Pearl's afflictions, the treatment therefor, the serious nature thereof, and a planned operation, which are untrue and unwarranted, and further charges that:

> "These absurd repetitions convince that it is not desired by the Brief of Appellant to adhere to the undisputed facts and that it attempts to convey a wholly different and entirely wrong impression from the facts in evidence."

In determining whether this complaint is well founded, upon the soundness of which, as counsel for appellee states on Page 8 of said brief: *"we base our case upon the foregoing analysis of the language used" in said letter,* it is only necessary to consider the pertinent language of the letter itself (See Tr. 4-6). The pertinent parts of said letter are as follows:

> "* * * I had supposed that I would be quite a ways on my homeward bound journey by this time but fate deals elusively at times and handles our courses and actions in a curious and extremely decisive manner at times. *I was discharged on Sept. 17th and expected to start home on the 18th but not having received the desired results at the Naval Hospital, Judge Wickersham and Dr. Cline head of the Veterans Bureau stopped the effect of my discharge and I was put in Mt. Alto*

*Hosp. * * * Well I am here and so much examining as I have gone thru has nearly worn me out. Last Thursday I had the worst spell from several standpoints that I have ever had. The headache, breastache, and stomach nausea, a resultant of their co-operative aches were very severe and the almost complete blindness that came upon me lasted more than 12 hours the longest spell I have ever had. * * * I had 3 major and several minor ones at the Naval hospital. They did not understand them at all so that is why I am here.* Dr. Ballou, who has my case in charge, is a wonderful man * * * he goes right to the bottom of things * * * he is having me treated for chronic diarrhoca now but is looking after my eyes every day.

"* * * I started out to church today and got 3 blocks on my way when the eye pressure commenced and I turned back none too soon either for both the head and breast ache commenced and were quite severe when I arrived back at the hospital and jumped into bed. In about an hour the spell was gone. My head still aches but the vision dimming is all gone again.

"We have to give reference as nearest of kin to be notified in case of death. I gave you my boy, *and in case I die if they do operate I bequeath you my belongings and property all except $100 to be given to Robert Gallagher to help him in his education. I would ask to be buried here in Arlington Cemetery. I do not expect to die but to be on my way home by the 20th of October or soon after as they are going right after my case properly*" (Emphasis ours).

It thus appears that the language of this letter fully (1) details serious afflictions, symptoms and treatment; (2) that while Mr. Pearl had been discharged from the Naval Hospital, where they did not understand the serious nature of his ailments, the heads of the Veteran's Bureau sent Mr. Pearl to the Mount Alto Hospital, Washington, D.C., for further examination and treatment; that they

were examining him so much that he was nearly worn out, and that he had just had the worst spell from several standpoints that he had ever had; that the headaches, breastaches and stomach nausea were very severe, and that almost complete blindness had come upon him which lasted more than twelve hours, the longest spell he had ever had; (3) that they were going to the bottom of things, and that he had to give reference of next of kin to be notified in case of death, and that he gave the name of Paul Greimann and added *"and in case I die if they do operate, I bequeath you my belongings and property,"* etc.; and (4) *"I do not expect to die, but to be on my way home by the 20th of October or as soon after as they are going right after my case properly"* (Emphasis ours).

The fact that Mr. Pearl believed that an operation was impending is too obvious to warrant further discussion. He expected to survive the operation, but, as he states, in the event they did operate and he did die, he bequeathed Greimann his belongings and property. As the record shows, Mr. Pearl was not operated upon and did not die and lived some thirteen years thereafter and died three years after rejoining his family in Oklahoma.

On Page 8 of Appellee's Brief it is stated with regard to Appellant's Brief that the Brief of Appellant fails to disclose any attempt to study or to analyze the language of the letter in question. The fact is that in said Appellant's Brief on Pages 3-4 the material parts of the said letter appear; on Pages 19-20 appears the specification based on said letter as No. 3; that on Pages 21-24 the language of the letter is analyzed; that on Pages 26-51 the fact that

said letter is a contingent "IF" letter is fully presented, and the further fact that no authority construing such an "IF" letter has held such a letter to be entitled to probate is demonstrated. It thus appears that counsel for appellee is mistaken in the statement that the pertinent language of said letter was not analyzed in Appellant's said Brief.

The above contention on the part of Appellee that the letter presented for probate herein was not contingent and conditioned upon the death of its author as appears from Pages 6-18 of Appellee's Brief, is the only point presented therein.

Authorities relied upon by appellee insofar as in point are against probation of letter as a will.

As supporting the sole contention of appellee herein that the operation of the letter here involved as a will was not contingent upon the death of its author as the result of the contemplated operation counsel present the following authorities:

The American Law of Administration, Third Edition, by Woerner, Pages 70 and 71, and *French* v. *French,* 14 West Va. 458, referred to therein. The quotation from the text of Worner, in substance that the contingent character must appear from the will itself and not from extrinsic evidence, and that as to whether it was the intention of the testator to make the will contingent is the important consideration, correctly states the general rules as is fully presented on Pages 24-36 Appellant's Brief

herein; however, this statement of the general rules immediately follows the statement of the rule applicable to the letter here involved, as follows:

> **"A will is usually absolute in its provisions, but the testamentary character of the instrument itself may be made conditional upon the happening of some event, and is then void as a will unless such event happens. * * *"**

This statement of the controlling rule in the case at Bar is supported by the citations in note (8) on said Page 70 of many of the cases presented on Pages 24 to 51 of Appellant's Brief.

While Woerner refers to the opinion in this French case as "presenting some instructive features" the holding in said French case is not approved by Woerner. As will be later pointed out counsel for appellee omitted the "instructive feature" from the quotation from Woerner.

The language of the will in this *French case* was: "Let all men know hereby, if I get drowned this morning, March 8th, 1872, that I bequeathe all my property, personal and real, to my beloved wife, Florence." It appeared that the testator, Wm. T. French, had no children, and at his death on December 29, 1874, some two years after the execution of the will, he was survived by his widow, Florence, and his father, William French. At the time the will was executed, Florence, his wife, was the sole heir of the testator, Wm. T. French, under the then existing statutes of "DESCENT AND DISTRIBUTION"; however, after the will was executed, and prior to the death of the testator, Wm. T. French, said statute was amended so as to make William French, the father of the testator, his sole heir.

It thus appears that in the event the will was refused probate, the said father would inherit the property of said decedent and not the widow. As appears from the majority opinion in this French case, this fact was controlling in influencing the majority of the court in holding that the will should be probated, and in said majority opinion the fact that the great weight of authority was against the probation of the said will but for the "peculiar surroundings" in this "particular case" as is clearly stated in the opinion as follows:

> "At the time the paper in controversy in the case at bar was written, March, 1872, under the law of descent and distribution then in force the wife was the sole legal heir and distributee of decedent, there being no children nor their descendants. Code of West Va., Chap. 78, Sections 1, 9. In *Lomax Digest,* 3 Vol., Marginal Page 105, it is stated as law that 'Devises are in some cases void *ab initio;* as where the testator devises what the law already gives, etc.;' 'that it is a rule of law that when a testator makes the same disposition of his estate as the law would have done, if he had been silent, the will being unnecessary is void. * * *' Judge Lomax in the passage just quoted from his work has reference perhaps to real estate and not personal, but this I do not determine. But the 10th Section of Chapter 77 of the Code of this State provides, that 'A will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless contrary intention shall appear by the will,' and a will is ambulatory and cannot and does not take effect until the death of the testator. In 1873 the Legislature of this State passed an Act entitled 'An Act to amend and reenact Section 1 of Chapter 78 of the Code of West Virginia, concerning the course of descents,' approved December 22, 1873, which so changed the law of descents in the Code, that on the death of the decedent, he leaving no child nor the descendants of any child, the father was made and became the legal heir as to the real estate. This last named Act was in force in

December, 1874, when William T. French, the decedent, died. *So that between the date of the execution of the will and the death of the decedent the 'legal heir' of the decedent was changed from the decedent's wife to his father.* 'If the law has made a change in heirship between the date of the will and that of the testator's death, the testator will be presumed to have contemplated the possibility of such change, and to have used his words accordingly.' * * *

"It seems to me, if F. makes and executes his will in due form of law, by which he devises his estate to his wife, who at the time of the execution of the will would have been his legal heir if he had then died, but before the death of F. the law is changed, so that the father at the time of his death is his legal heir, the will should ordinarily in that case or a like case be held valid, and not void for that reason; and to that end, if necessary, the court, to carry out the intention of the decedent and to avoid intestacy, would and ought to presume, if necessary, that the will was executed in contemplation that the law might be changed as to heirship before his death. * * *

"It is to be presumed that the decedent and his wife knew at the time said paper-writing was executed, that if the decedent died on that day intestate, his wife was his sole legal heir and distributee of his real and personal estate. What then was the purpose and object of the testator in executing said paper-writing? Had he in so doing the *animo testanda?* How could that quiet her fears? If it was his property that disturbed and distressed her in case of the death of her husband in crossing the river that morning, then the execution of the will could not tend in the least to quiet her fears, for in case of his death on that day she would have been entitled by law to all his property. If it was danger and peril to the life of her husband in attempting to cross the river on that morning in the then condition of the river, the execution of said paper-writing could have given her no relief in mind or feeling, for it was no security against the danger and peril of her husband. * * *

"What was the motive or purpose of the decedent in executing the paper-writing in question in the case at bar, regarding him as a man of sound mind, and considering the evidence in chief of Mrs. French, taken by plaintiff, and the surrounding circumstances and the facts, of which the decedent is presumed to have known, to which I have before referred? Can we conclude that the decedent jestingly executed said paper-writing, and handed it to his wife with directions to take care of it? To do so would be to so determine without sufficient evidence of the fact, in my humble judgment. The acts and verbal declarations of the deceased at the time, do not indicate anything like jest; and the circumstances, which evidently led to its execution, or were the reason therefor, were not such as would be likely to cause a sane man to indulge in a mere jest of that description with his wife distressed for his safety, which could not in fact have been considered by her short of a gross insult, as well as a source of great mortification, for she is presumed to have known the law of descents and distribution as well as the decedent. Mrs. French swears that she thought her husband was in earnest, and to attribute to him the opposite, under the circumstances, would be unnatural.

"Can we consistently and properly construe said paper to be conditional and contingent, that is to say, from the language employed in the said paper-writing *and the surrounding circumstances and the facts which the decedent must have known, that it was the intention of the decedent to do a silly, absurd and useless act, an act without meaning, that he had no reasonable purpose in view, for if it is conceded that the decedent's purpose in executing said paper was that it should not take effect unless he died or was drowned on the morning of its execution, then there is no escaping the conclusion that the decedent in executing said paper-writing and delivering it to his wife to take care of knowingly, in legal presumption, did a silly, absurd, useless and meaningless act, without any purpose or mo-*

tive whatever, such an act as a person in possession of his reasonable senses would not be likely to do.

"If we ascertain his intent in executing said paper-writing to have been to make an unconditional testament giving his property to his wife, who he indicated to be the chief object of his bounty, at his death, then we determine that the decedent in making said paper-writing did a reasonable act, such an act as a reasonable man might well and consistently do. * * *

"In the light of some of the more recent English authorities and Virginia cases which I have cited, and the rules of construction applicable to such a case, I am of opinion, under facts and surrounding circumstances, to which I have alluded, *we may well and properly conclude in this particular case with its peculiar characteristics, that said paper-writing was not intended by the decedent to be provisional and contingent, but was intended by him to be absolute; that the language used by the decedent in the said paper-writing can in his particular case, with its peculiar surroundings, be reasonably interpreted and construed to mean, that he refers to the calamity, and the time during which it may happen, as the reason for making said paper-writing, and not as the condition upon which the disposition of the property is to become operative; and that the will should be interpreted as though it read: 'Lest I get drowned this morning; or lest I die this morning.'* It is no valid objection to carrying out the obvious intention of the testator, if it be not illegal or against good morals, that it is strange, or unnatural or absurd. But such a construction will, if possible, be adopted, as will uphold the will, and bring it as near reason and good sense as practicable. * * *

"After patient and careful consideration of the whole case I am convinced in my own mind, that the decedent seriously executed said paper-writing, and that it was his purpose and intent in so doing to make a testament; that he executed it *animo testandi*, and that it was the intent and purpose of the decedent that said paper-writing should be his unconditional will and

testament, giving to his wife, Florence, all of his real and personal estate at his death, whether natural or otherwise; *and the court, in order to give effect to the intention of the decednt, will presume that said paper-writing was executed in contemplation of any change of the law of descents as to legal heirship which might be and was made between the date of the said will and the death of the decedent. * * * Under a different state of facts and surrounding circumstances in some material aspects I might have felt myself bound, under the legal authorities, to have come to a different conclusion. But I cannot avoid the convictions of my mind in this novel and peculiar case as I have before stated them. * * *"*

In a dissenting opinion the "President" of the court points out the fact that in the majority opinion it is conceded that the controlling authority is against the probation of the contingent will, and that the unusual, novel and peculiar facts of the case did not warrant the majority in disregarding said authority and probating the will.

It thus appears that neither Worner, nor the opinion in French v. French, supports the contention that the letter involved in the case at Bar should be probated as no unusual, novel and peculiar facts exist to influence the probation of said letter in the face of controlling authority. As will be hereinaftter pointed out all such facts in the case at Bar are against the probation of said letter.

The further fact should be noted that the quotation from this *French case* appearing on Page 11 of Appellee's Brief is not only fragmentary but same omits and stars out the above quoted portion of the opinion *wherein it is stated that said peculiar, novel and unusual facts influenced the decision in favor of the probation of the will. This omission is obviously misleading and required the above full*

presentation of the case to make clear the fact that the opinion in this French case is not only not in point in support of the contention of appellee, but recognizes the rule to be to the contrary, and that the said letter should not be probated. In the case at bar we are not concerned with the question as to whether the said unusual, novel and peculiar facts in this *French case* justified the rendition of the majority opinion in the face of controlling authority, and are only concerned with the fact that the said opinion really holds against the contention of appellee.

2. The second authority cited by appellee is *Eaton* v. *Brown,* 193 U. S. 411, 24 S. Ct. 487, 48 L. ed. 730. In the opinion the court clearly differentiates the provision of the will involved from "IF" instruments, such as the letter in the case at bar, *and cites with approval the controlling authority presented in Appellant's Brief herein.* This case is fully presented on Pages 52-54 of Appellant's Brief, and we refrain from burdening the Court with repetition.

3. In *In re: Boutelle's Estate,* 15 N.W. (Minn. 2d) 506, the third authority cited by appellee, no issue or question relating to a contingent will was presented, and the question was as to the scope of the provision of the will which devised "all books of account." In stating two rules of construction the court held:

> "1. In arriving at what was in testator's mind when he made his will, court will look to entire contents of will, keeping in mind, however, that the language testator has chosen is presumed to express his intention. * * *

"2. The primary import of isolated words may be modified or controlled by testator's dominant intention where, from his whole will, such intention clearly appears."

Said stated rules are sound and support the contention of appellant herein as is fully presented in Appellant's Brief.

4. In *Barber* v. *Barber* (Ill.), 13 N.E.(2d) 257, the next authority cited by appellee, the fact is, and the court held, *that the language of the will did not even intimate that the bequest was contingent on the death of the testator on the trip referred to, and held to the contrary that one of the letters clearly states that until a will is prepared in legal form and filed away said bequest should be in full force and effect.* In the opinion the court states and approves the principles and rules relied upon by appellant and cites and discusses practically all the cases presented in Appellant's Brief and differentiates same from the rule applicable to the will involved in the *Barber case.* This case is fully presented on Pages 56-57 of Appellant's Brief herein.

5. Appellee then cites Vol. 1, Section 96, Pages 209-210, *Page on Wills* (Lifetime Edition), wherein the general rule that the tendency is to construe wills to be permanent and not contingent where the language thereof will permit. This is sound and is discussed on Pages 24-36 and 60-62, Appellant's Brief. The statement of the above general rule by Page is immediately followed in Section 98 which states the application of same to the specific lan-

guage of a number of wills, and that same had been held o be contingent as follows:

"A provision 'should anything unfortunately happen to me while abroad, I wish,' or 'If I die at sea or abroad,' or 'If I die before I return from Ireland,' or 'I am going to town with my drill and am not feeling good, and in case I should not get back' or 'As I intend starting in a few days for the State of Missouri, and should anything happen that I should not return alive,' or 'I this day start for Kentucky; I may never get back. If it should be my misfortune,' or 'If I should not come to you again,' or 'If I never get back home I leave you everything I have in the world,' or 'If anything should happen to me while in a hospital for an operation,' or 'If I should die first,' or 'In case I do not recover,' or if anything happened to testator while in Constantinople or on the ocean, or a gift to wife for life 'if I should marry * * * in case she shall survive me' with a gift over in trust 'On the death of my wife, in case I should marry, if she survives me,' **has, in each case, been held to make the will conditional; and if the specified event does not happen, the instrument is not testator's will."**

In support of this text the following cases are cited:

Goods of Porter, L.R. 2 P. & D. 22, and cases cited there;

Lindsay v. *Lindsay*, L.R. 2 P. & D. 459;

Parsons v. *Lanoe*, 1 Ves. Sr. 189 Ambl. 557;

Magee v. *McNeil*, 41 Miss. 17 (See Page 46, Appellant's Brief;

Morrow's Appeal, 116 Pa. 440, 9 Atl. 660 (Pages 36-38, Appellant's Brief);

Dougherty v. *Dougherty*, 61 Ky. (4 Met.) 25 (Pages 45, 47, 51, Appellant's Brief);

Robnett v. *Ashlock*, 49 Mo. 171 (Pages 41, 49, 51, Appellant's Brief);

Todd's Will, 2 W. & S. (Pa.) 145 (Pages 37, 38, 39, Appellant's Brief);

Maxwell v. *Maxwell,* 60 Ky. (3 Met.) 101 (Pages 41, 43, 45, Appellant's Brief);
Walker v. *Hibbard,* 185 Ky. 795, 11 A.L.R. 832, 215 S.W. 800 (Pages 35, 44, 45, 46, 47, Appellant's Brief);
Davis v. *Davis,* 107 Miss. 245, 65 Sou. 241 Pages 49, 50, Appellant's Brief);
In re Young's Estate, 95 Okla. 205, 219 Pac. 100 (Pages 50-51, Appellant's Brief);
In re Poonarian's Will, 234 N.Y. 329, 137 N.E. 606 (Page 39-41, Appellant's Brief);
Hampton v. *Dill,* 354 Ill. 415, 188 N.E. 419;
Page on Wills, Lifetime Edition, Page 211, Sec. 98.

We submit that Page is an authority against the contention of appellee that the letter here involved is entitled to probation and strongly supports appellant.

6. Section 4639, Compiled Laws of Alaska, 1933, relating to the construction of wills simply enacts the general rule that due regard to the directions of the will and the direct intent and meaning of the testator should be had in all matters brought before the court.

7. *In re: Tinsley's Will* (Iowa), 174 N.W. 4, is next cited by appellee without comment, except to state that the Court will appreciate its significance in determining what is meant by the language used by Mr. Pearl in the letter here involved. The opinion in this *Tinsley case* is presented on Page 56 of Appellant's Brief, *and it appears in the opinion therein that the controlling principles and rules for the construction and classification of testamentary instruments, as to being contingent or general, presented in Appellant's*

Brief are stated and approved; however, they are held inapplicable in the Tinsley case for the reason that the pertinent language used in the will only meant that in case of my death, without stating a specific event.

8. The cases of *Watkins et al.* v. *Watkins Admr.*, 106 S.W. (2d) 975; *In re Forquer's Estate*, 66 Atl. 92; and *Ferguson* v. *Ferguson*, 45 S.W. (2d) 1096, are cited without comment on Page 15 of Appellee's Brief. Same are fully discussed on Pages 47-48, 27-33, 28, 30, of Appellant's Brief, and do not support the contention of appellee.

9. Appellee next cites *In re: Succession of Gurganus*, 20 Sou. (2d) 296, and makes the charge that: "Undoubtedly appellant overlooked this *Gurganus case* purposely. It flatly contradicts and overthrows his contention in this case." *In this Gurganus case, as in the French* v. *French case, supra, Page 5, the quotation in Appellee's Brief from the opinion does not reveal the holding in the case or its application to the sole issue in the case at bar.* In the opinion the court cites with approval several of the leading cases presented in Appellant's Brief and which hold that testamentary instruments conditioned, as the letter in the case at Bar, are contingent and not entitled to probate, and directed attention to the fact that such language did not occur in the will presented and held the said will to be general in its nature and not contingent since it was not stated therein that the will was intended to be operative only during a certain period or until a certain emergency had passed. After discussing and approving opinions holding

that wills containing language in legal effect identical with the letter involved in the case at Bar were not entitled to probate, the court states:

> "We are presented with a case entirely different from those cited by the appellant. In the present will, we find different language: '* * * if anything should happen that I would not return. I want my sisters * * * brothers, * * * to have what I own * * *.'
>
> "Undoubtedly the testatrix was thinking of the possibility of death or she would not have made a will. The will is general in its nature, and the reason assigned for writing the will is general in its nature. It does not appear that it was intended to be operative only during a certain period or until a certain emergency had passed. The authorities cited by the appellant involve wills that clearly show that they were intended to be operative only during a certain period of time or until an emergency had passed. This is not true in the present case. * * *
>
> "Unless terms of will show that it was intended to be contingent, will must be regarded as unconditional. * * *
>
> "The intention of testator governs, and such intention must be ascertained from terms of the will."

Since it clearly appears that this case does not support the contention of the appellee, and is not directly in point in support of the contention of appellant, and only indirectly supports said contention, it is believed that counsel for appellee has no cause to charge counsel for appellant with ulterior motives in not citing same.

10. From *McMerriman* v. *Schill* (Ohio), 140 N.E. 600, Appellee quotes the statement that, in the absence of controlling decisions of the Ohio courts and there being

conflict in the applicable cases from other states and English courts, the court was disposed to follow the holding of the Supreme Court of the United States in *Brown* v. *Eaton, supra,* (Page 12 and Pp. 52-54, Appellant's brief), because of the fact that the wills presented in *Brown* v. *Eaton* and in the *McMerriman case* were identical in legal effect and did not specifically show that the operation of same was contingent on the happening of a specifically stated event, and the situation and status of the testator at the time of his death were the same as when the wills were executed, and that said fact was considered as controlling, as is pointed out in Appellant's Brief herein, on Pages 57-59.

11. Appellee then cites, *In re Morris' Estate* (Pa.), 2 Atl. 761. This case is presented on Page 59 of Appellant's Brief. It clearly appears and the court in the opinion states that the will was not made contingent upon the occurrence of a specifically stated event. *In the letter presented for probate in the case at Bar, the language used specifically limits the operation of the bequest to the occurrence of the death of the testator from the anticipated operation.*

12. Appellee, on Page 22 of said reply brief, cites Paragraphs 3 and 5 of the Syllabus *In re Langer's Estate,* 281 N.Y.S. 866, wherein is stated the general rule that wills will not be regarded as contingent where it can be reasonably held that the testator was merely expressing the inducement to make the will and that, as a general rule, mere matters of inducement do not constitute a condition

which requires the rejection of the will. This general statement of the rule is sound but inapplicable in the case at Bar. In the opinion, with regard to the language of the will involved, it is stated, "There is not to be found in it the statement of a specific hazard or of a specific contingency, such as was found in regard to *Poonarian's Will*, 234 N.Y. 329, 137 N.E. 606, upon which contestants rely." This *Langer case* is presented on Pages 59-60 of Appellant's Brief herein.

13. The contention that Appellant, Byron W. Wood, the administrator and an heir to the estate of the decedant, J. M. Pearl, was not entitled to invoke the aid of the said probate court is not sound.

The Amended Petition of the Appellant, Byron W. Wood, filed in the said probate court, contesting probation of the said letter as the will of J. M. Pearl, deceased, among other things, alleged the following facts and proceedings, which are undenied, and which appear in the transcript:

(1) That the said Byron W. Wood was a full brother and a heir to the estate of the deceased, J. M. Pearl (Page 10, Transcript).

(2) That said Wood is the "duly qualified and acting administrator of the estate of the deceased Pearl, having been appointed by C. J. Blinn, Judge of the District Court of Oklahoma County, on the 31st day of July, 1945. A certified copy of the appointment is hereto attached marked Exhibit 'A' and made a part hereof, by reference."

(3) That, other than the property of the said decedent which is located in Oklahoma, all the estate of said Pearl consisted of personal property located in Alaska.

(4) That, under the provisions of the Compiled Laws of Alaska, either the administrator or heir of an estate may contest the probation of a will purporting to devise the property of the estate.

14. The contention of counsel for Appellee, on Page 18 of Appellee's Reply Brief, that the Motion to Dismiss said Amended Petition and the Demurrer thereto of the Appellee, Greimann, which were filed in and overruled by the probate court, was that Wood "had no standing in the probate court" is likewise unsound for the reason said Motion to Dismiss and Demurrer were abandoned on the trial of the appeal *de novo* in the District Court by the said Griemann, and same were not presented to, considered or passed upon in said trial, and no Motions, Demurrers or Objections of any kind or nature, and no issues of fact were presented on said trial on the part of either party, and the sole question presented to the District Court was one of law and as to whether, under the record, the letter was or was not contingent (Pages 44-46, Transcript).

The fact should be noted that the Brief of Appellee herein shows that said Motion to Dismiss and Demurrer were not presented on said trial in the District Court. That same, on that account, were abandoned as elementary.

15. Likewise, the statement on Page 20 of said Brief that "the trial court ignored this question of jurisdiction in his opinion and decided the case on its merits, disregarding technicalities in pleadings. If we have now a right to do so, we direct the attention of this Court to that question. We believe we have such right as it raises the question of jurisdiction," is erroneous. *The trial court did not ignore any question or issue which arose or was presented on the said trial which related to jurisdiction or otherwise, as appears on Pages 44-46 of the Transcript herein.*

16. The contention that the fact that decedent, J. M. Pearl, was survived by his wife, in the event he died intestate, left said wife as his sole heir is likewise unsound. The record shows that the decedent, J. M. Pearl, was a resident of Oklahoma and had continuously resided in Oklahoma for three years at the time of his death, and that the property of decedent, other than the property located in Oklahoma, was personal property, being money on deposit in escrow. Sections 212 and 213 of Title 84, O.S.A. 1941, control. Said Section 212 in substance provides that the property of an intestate passes to his heirs, *subject to the control and possession of the administrator or executor until distribution is made,* and Section 213 of the same provides for succession as follows:

> "If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or, if he leave both father and mother, to them in equal shares; *but if there be no father or mother, then said*

remaining one-half goes, in equal shares, to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation."

Under the provisions of the statutes of Alaska (C.L. 4400, 4429 and 4431) executors and administrators are entitled to the possession and control of the assets of estates and have the duty of recovering and protecting the property of the said estates, paying claims and distributing same to the heirs or devisees. It thus appears that the Appellant, Byron W. Wood, is entitled, as the duly appointed administrator of the estate of the said J. M. Pearl, deceased, to contest the probation of the letter herein involved.

Aside from the above, as clearly appears from the pleadings, proceedings and judgment set forth in the transcript herein, no issue or question relating to the above contention on the part of the Appellee was pleaded, presented or determined in the trial in the District Court and that the only issue presented and determined on said trial was the question of law as to the proper construction of the said letter.

17. The purported Bill of Exceptions appearing on Pages 62-73 of the Transcript was not filed and presented in time and, on that account, was not allowed and signed and settled by the trial court; however, the sole question of law presented on this appeal is fully supported by the properly certified transcript herein, aside from and independently of said Bill of Exceptions.

18. Aside from that fact, counsel for the Appellee, on Pages 20-21, not only deliberately elects not to attack or to move to strike said Bill of Exceptions, but adopts and refers to the evidence incorporated therein and urges the consideration of said evidence as supporting the Appellee's contention herein

that said letter is entitled to be probated. (See Page 3, under "FACTS" and Page 5 under "PLEADINGS AND PROOF" of Appellee's Brief.) The rule is elementary that where a party elects to recognize, use and rely upon a pleading or document, including a Bill of Exceptions, in the presentation or in the defense of a cause, said party waives the objection that said is not authentic and is estopped from impeaching same. In Sec. 1 on Page 289 of 67 *Corpus Juris,* waiver is defined as the voluntary and intentional relinquishment or abandonment of a known legal right, advantage, or benefit, which, except for the acts, which amount to a waiver, the party could have enjoyed. That waiver results from such conduct as warrants the inference of the relinquishment of such right as the doing of an intentional act which is inconsistent with the claiming of the right, and it is further stated therein that:

> "Waiver occurs where one in possession of any right, either conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it; a waiver takes place where one dispenses with the performance of something which he has a right to expect" (Page 296, *Corpus Juris* 67).

In Sec. 2 thereof, Page 294, it is stated:

> "NATURE OF DOCTRINE. The doctrine of waiver has been characterized as technical, as of some arbitrariness. It is one of the most familiar in the law, prevalent in ancient as well as in modern times throughout every branch of law as well as of practice. It is presented most frequently in those cases which have arisen out of litigation over insurance policies, but it

is a doctrine of general application, confined to no particular class of cases, extending to rights and privileges of any character. * * * It has been said the doctrine belongs to 'the family of,' is of the nature of, is based upon, estoppel. The essence of waiver, it has been stated, is estoppel, and where there is no estoppel, there is no waiver. 'Waiver' and 'estoppel' are frequently used as convertible."

As is stated in Note 48, Page 294, said rule is as follows:

"A rule by which, regardless of absence of any element of estoppel or consideration as those terms are popularly understood, the maxim that one shall not be permitted to blow hot, then with advantage to himself turn and blow cold, within limits sanctioned by long experience as required for the due administration of justice, has been prohibitively applied."

In Section 10, Page 309, same, it is stated:

"Intention need not necessarily be proved by expressed declarations; it may be shown by acts and conduct, from which an intention to waive may reasonably be inferred, as well as by words or declarations—oral or written expressions; * * *."

The above texts are supported by the citations of numerous federal and state cases, and none are cited *contra.*

In 4 *Corpus Juris,* Sec. 1906, under Appeal and Error —"Waiver of Objections to Filing, Settling and Signing Bills of Exception"—it is stated that objections thereto are waived by acquiescence or by the failure to raise the objection *or by conduct inconsistent with the intention to take advantage of such failure.*

In 4 *Corpus Juris,* Section 870, Page 1375, under the same headings the rule is stated to be that "objections

to a bill of exceptions that it is not presented, signed and settled within the time required by statute, are allowed by the court, may be waived by the objecting parties, acquiescence, failure to object promptly, or other conduct inconsistent with the intention to rely on the delay." Certainly said reliance on said bill of exceptions by counsel for Appellee in using the evidence set forth therein in the case at Bar is a waiver of any objections thereto that Appellee might otherwise be entitled to present.

19. The general statement on Pages 20-21, Appellee's Brief, that "the transcript in this case is so irregular, confusing, incorrect and incomplete as to justify a motion to strike the same from the record, but we have refrained from such course of action lest we deceive ourselves by so doing," is erroneous. Counsel points out no defects, and the fact is, the only confusion is such as might result from the fact that said transcript contains the purported Bill of Exceptions *which duplicates a number of the documents which are also set forth in the transcript and, to that extent, is repetitious.* The fact is that the contents of the Bill of Exceptions is the same, insofar as it goes, as the transcript, except that the evidence of Paul Greimann, appears therein on Pages 66-73, which evidence is accepted and urged on the part of Appellee, as is set forth on Pages 22-24, *supra,* this brief.

20. Likewise, the statement on Page 21 of Appellee's Brief that: "Appellant has carried on this appeal in an *ex parte* manner and has failed to serve on Appellee's attor-

ney of record any of the essential appeal papers, except the Notice of Appeal" (R. 46-48), is not supported by the transcript. In addition to showing the due service of Notice of Appeal on Pages 46-49, the transcript further shows that on February 7, 1947, the Assignment of Error and Bill of Exceptions were duly served on Appellee (Tr. 61), and that, on October 21, 1946, counsel for Appellee accepted service of Notice of Appeal (Tr. 77), and that citation to Appellee and Appellee's attorney to appear, etc., were duly served by the deputy United States Marshal (Tr. 89-90). Counsel for Appellee do not point out any notice relating to the appeal herein which the Appellant failed to give Appellee, and the transcript specifically shows that all required notices were duly served.

The fact is, the only irregularity appearing in the record of the proceedings was the failure of counsel for Appellant to present the purported Bill of Exceptions to the trial court for settling and signing within time, and, on that account, the only specifications presented by Appellant on this appeal relate to the construction of the language of the letter presented for probate and the unchallenged allegations of the pleadings. Recognition of the fact that this was an appeal on the transcript no doubt influenced counsel for Appellee to elect to accept and adopt as valid said purported Bill of Exceptions, to the end that the said evidence of Appellee, Paul Greimann, which is set forth in said Bill of Exceptions (Tr. 66-73), might be presented and relied upon by Appellee (see Paragraph 18, Pages 22-24, *supra);*

however, said evidence of the Appellee, Greimann, only serves to corroborate and in no particular militates against the sufficiency and legal effect of the language of the said letter and the pleaded and unchallenged facts which clearly reveal that the operation of the said letter as a will was contingent on specifically stated events which did not occur. Having fully presented the controlling principles and supporting authorities in Appellant's Brief herein, we respectfully submit that the said letter should be denied probate.

Respectfully submitted,

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DECEMBER, 1947.